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DATO' SERI ANWAR IBRAHIM

v.

PERDANA MENTERI MALAYSIA & ANOR

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FEDERAL COURT, PUTRAJAYA
ALAUDDIN MOHD SHERIFF PCA
MOHD GHAZALI YUSOFF FCJ
ABDULL HAMID EMBONG FCJ
[CIVIL APPEAL NO: 01(f)-4-2008(W)]

C

8 MARCH 2010

CONSTITUTIONAL LAW: *Executive - Dismissal of Minister - Revocation of appellant's appointment as Deputy Prime Minister and Minister of Finance by Prime Minister - Whether prior approval of Yang*

D

di-Pertuan Agong required - Whether dismissal valid - Federal Constitution, art. 43(5)

CONSTITUTIONAL LAW: *Executive - Dismissal of Minister - Revocation of appellant's appointment as Deputy Prime Minister and Minister of Finance by Prime Minister - Whether any legal provision as*

E

to how to effect a revocation of ministerial appointment - Whether revocation of the appellant's appointment to be conveyed to the appellant personally by the Yang di Pertuan Agong - Whether sufficient for Yang di Pertuan Agong to gazette an Order under s. 2 of the Ministerial Functions Act 1969 - Ministerial Functions Act 1969, s. 2

F

CONSTITUTIONAL LAW: *Yang di-Pertuan Agong - Roles and functions of - Yang di-Pertuan Agong's role in the appointment to and revocation of ministerial office, whether limited - Whether power to appoint and revoke ministerial appointments at Prime Minister's discretion -*

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Whether reference to Yang di-Pertuan Agong in art 43(5) of Federal Constitution merely a formality - Federal Constitution, art. 43(5)

The appellant was appointed the Deputy Prime Minister and the Minister of Finance after the General Elections in 1995. Through

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a letter dated 2 September 1998, the first respondent revoked the appellant's appointments with immediate effect. The appellant contended that the first respondent had unlawfully revoked his appointment as a Cabinet Minister. It was the appellant's contention, *inter alia*, that the first respondent had effected the

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revocation without having the prior assent of the Yang di Pertuan

Agong. The appellant sought various declarations and relief in the High Court but his action was struck out on the respondents' application under O. 18 r. 19(1) of the Rules of the High Court 1980. The appellant's subsequent appeal to the Court of Appeal was dismissed and he thus appealed to the Federal Court. In the Federal Court, the appellant's appeal was pursued on the basis that: (i) pursuant to art. 43(5) of the Federal Constitution, it was only the Yang di-Pertuan Agong who could revoke the appellant's appointments as Deputy Prime Minister and Minister of Finance; and (ii) an order to delete the name of the appellant from the post of Deputy Prime Minister and its substitution thereof with the name of the first respondent as the Minister of Finance under the Ministers of the Federal Government (Amendment) Order 1998 ('the Order') could not cure the first respondent's non-compliance with the art. 43(5) of the Federal Constitution ('FC').

Held (dismissing the appeal with costs)
Per Alauddin Mohd Sheriff PCA delivering the judgment of the court:

(1) Article 40(2) of the Federal Constitution divides the functions of the Yang di-Pertuan Agong into two distinct categories; *ie*, those functions that His Majesty may exercise in His Majesty's discretion and those that His Majesty must exercise in accordance with ministerial advice. The Yang di Pertuan Agong as a constitutional monarch has a very limited role in the appointment of Cabinet Ministers. In actual fact, the power to choose and appoint Ministers resides with the Prime Minister. His Majesty does not have any discretion to reject or question the discretion of the Prime Minister. Revocation of ministerial appointment equally lies with the Prime Minister, having regard to the principle that it is only the authority that appoints which has the right to revoke the appointment. Reference to the Yang di Pertuan Agong in art. 43(5) of the FC is only a formality by virtue of His Majesty being the constitutional monarch. Such a clear demarcation of power and roles between the Prime Minister and the Yang di Pertuan Agong in matters of appointment and revocation of ministerial posts is imperative in order to realize the role of collective responsibility of the Cabinet Ministers. *Merdeka University Bhd. v. Government of Malaysia* (foll). (paras 32-43)

(2) In the instant appeal, the Federal Court would agree with the High Court and Court of Appeal that the requirements under art. 43(5) of the FC had been met. On the facts, the revocation of the appellant's appointment was made in accordance with art. 43(5) of the FC and was therefore valid in law. The appellant's contention that it was the first respondent who had effected the revocation and not the Yang di Pertuan Agong was fallacious and untenable. (paras 44-53)

(3) The format and manner on how a revocation is to be effected is not provided in the law. Neither is there any legal provision which provides for the revocation to be gazetted. There is also no legal provision which requires the revocation of the appointment of the appellant to be conveyed to the appellant personally by the Yang di Pertuan Agong. (para 56)

(4) The Order as a gazette was a form of subsidiary legislation and deemed to be validly made under the enabling powers thereto. A gazette constituted *prima facie* evidence of the terms of written law, appointment or other matters stated therein. In the instant case, the Order was made by the Yang di Pertuan Agong by virtue of s. 2 of the Ministerial Functions Act 1969. Therein, His Majesty had notified the revocation of the appellant's appointment and that the order was made under His Majesty's command. Such a command from His Majesty, in the absence of any contrary evidence, implied that it was made with explicit assent. Once the assent was given, it showed that His Majesty had accepted the advice of the Prime Minister and had acted on such advice. (paras 57-61)

(5) The gazette was sufficient evidence to show that the requirements of art. 43(5) of the FC had been met. The appointment of the appellant as the Deputy Prime Minister and the Minister of Finance had therefore been validly revoked by the said Order. Thus the omission of the first respondent, if any, to follow the requirements under art. 43(5) was curable by the said order. (paras 62-63)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah dilantik sebagai Timbalan Perdana Menteri dan Menteri Kewangan selepas Pilihanraya Umum 1995. Melalui surat bertarikh 2 September 1998, responden pertama telah membatalkan perlantikan perayu berkuatkuasa dengan serta merta. Perayu mengatakan bahawa responden pertama telah memecatnya sebagai Menteri Kabinet dengan secara tak sah sambil berhujah, antara lain, bahawa pemecatannya telah dibuat oleh responden pertama tanpa terlebih dahulu mendapatkan persetujuan Yang di Pertuan Agong. Perayu memohon beberapa perisytiharan dan relif di Mahkamah Tinggi, tetapi tuntutannya telah dibatalkan atas permohonan responden-responden di bawah A. 18 k. 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980. Rayuan perayu berikutnya ke Mahkamah Rayuan juga ditolak dan beliau dengan itu merayu ke Mahkamah Persekutuan. Di Mahkamah Persekutuan, perayu mengasaskan rayuannya atas pengataan bahawa: (i) di bawah fasal 43(5) Perlembagaan Persekutuan, hanya Yang di-Pertuan Agong boleh membatalkan perlantikannya sebagai Timbalan Perdana Menteri dan Menteri Kewangan; dan (ii) suatu perintah yang dibuat di bawah Perintah-Perintah Menteri Kerajaan Persekutuan 1998 ('Perintah') untuk menghapuskan nama perayu dari jawatan Timbalan Perdana Menteri dan penggantiannya dengan nama responden pertama sebagai Menteri Kewangan tidak boleh mengubati ketakpatuhan responden pertama terhadap fasal 43(5) Perlembagaan Persekutuan ('PP').

Diputuskan (menolak rayuan dengan kos)
Oleh Alauddin Mohd Sheriff PMR menyampaikan penghakiman mahkamah:

(1) Fasal 40(2) PP membahagikan tugas-tugas Yang di-Pertuan Agong kepada dua kategori berasingan, iaitu, tugas di mana Baginda boleh melaksanakannya melalui budibicara Baginda dan tugas yang hanya boleh dilaksanakan Baginda atas nasihat menteri. Yang di Pertuan Agong selaku raja berperlembagaan mempunyai kuasa terhad dalam hal perlantikan Menteri-Menteri Kabinet. Pada hakikatnya, kuasa untuk memilih dan melantik Menteri-Menteri adalah hak Perdana Menteri. Baginda tidak mempunyai budibicara untuk menolak atau mempersoalkan budibicara Perdana Menteri. Begitu juga, kuasa untuk membatalkan perlantikan menteri adalah terletak pada Perdana Menteri, mengambilkira prinsip bahawa pihak yang membuat

perlantikanlah yang berhak untuk membatalkannya. Sementara itu, rujukan kepada Yang di Pertuan Agong dalam fasal 43(5) PP hanyalah satu formaliti mengambilkira kedudukan Baginda sebagai raja berperlembagaan. Pembahagian kuasa dan tugas yang jelas sedemikian di antara Perdana Menteri dan Yang di Pertuan Agong dalam hal-hal perlantikan dan pemecatan jawatan-jawatan menteri adalah perlu bagi merealisasikan peranan tanggungjawab bersama yang diamalkan Menteri-Menteri Kabinet. *Merdeka University Bhd. v. Government of Malaysia* (diikuti).

(2) Dalam rayuan semasa, Mahkamah Persekutuan bersetuju dengan Mahkamah Tinggi dan Mahkamah Rayuan bahawa kehendak-kehendak fasal 43(5) PP telah pun terpenuhi. Berdasarkan fakta, pemecatan perayu adalah dibuat menurut kehendak fasal 43(5) PP dan dengan itu adalah sah di sisi undang-undang. Hujah perayu bahawa responden pertama dan bukannya Yang di Pertuan Agong yang telah memecat beliau adalah tersasul dan tidak boleh dipertahankan.

(3) Bentuk dan cara bagaimana sesuatu pemecatan itu harus dilakukan telah tidak diperuntukkan oleh undang-undang. Juga tidak terdapat peruntukan yang mengkehendaki supaya sesuatu pemecatan itu digazetkan. Seterusnya, tidak terdapat peruntukan undang-undang yang menuntut supaya pemecatan jawatan perayu hendaklah disampaikan kepada perayu secara kediri oleh Yang di Pertuan Agong.

(4) Sebagai suatu gazet Perintah adalah berbentuk undang-undang kecil dan dianggap telah dibuat dengan sahnya di bawah kuasa-kuasa pemboleh yang berkenaan dengannya. Suatu gazet adalah merupakan keterangan *prima facie* mengenai terma-terma undang-undang bertulis, perlantikan dan perkara-perkara lain yang dinyatakan di situ. Dalam kes semasa, Perintah telah dibuat oleh Yang di Pertuan Agong berdasarkan s. 2 Akta Tugas-Tugas Menteri 1969. Di situ, Baginda telah mengisytiharkan pemecatan jawatan perayu dan bahawa Perintah adalah dibuat atas kehendak Baginda. Perintah Baginda sedemikian, dalam ketiadaan keterangan-keterangan sebaliknya, membayangkan bahawa ianya dibuat dengan persetujuan Baginda. Sebaik persetujuan diberi, ianya menunjukkan bahawa Baginda telah menerima nasihat Perdana Menteri dan telah bertindak atas nasihat tersebut.

(5) Gazet adalah keterangan yang mencukupi untuk menunjukkan bahawa kehendak-kehendak fasal 43(5) PP telah dipenuhi. Perlantikan perayu sebagai Timbalan Perdana Menteri dan Menteri Kewangan dengan itu telah dibatalkan dengan sahnya oleh Perintah tersebut. Ianya mengikut bahawa ketinggalan oleh responden pertama untuk menuruti kehendak fasal 43(5), jika pun ada, telah diubati oleh Perintah tersebut.

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [2000] 2 CLJ 695 CA ***(refd)***

Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***

Merdeka University Bhd v. Government of Malaysia [1981] CLJ 175; [1981] CLJ (Rep) 191 HC ***(refd)***

Merdeka University Berhad v. Government Of Malaysia [1982] 1 LNS 1 FC ***(foll)***

Re Tan Boon Liat @ Allen & Anor Et Al; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri & Ors And Chuah Han Mow v. Menteri Hal Ehwal Dalam Negeri & Ors And Subramaniam v. Menteri Hal Ehwal Dalam Negeri & Ors [1977] 1 LNS 110 FC ***(refd)***

Shamim Reza Abdul Samad v. PP [2009] 6 CLJ 93 FC ***(refd)***

Sim Kie Chon v. Superintendant of Pudu Prison & Ors [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 SC ***(refd)***

Legislation referred to:

Federal Constitution, arts. 39, 40(1), (1A), (2), 43(1)(b), (5)

Interpretation Acts 1948 and 1967, s. 18(1)(b), 25, 61

Interpretation and General Clauses Ordinance 1948, ss. 18(1)(b), 25, 29, 61

Ministerial Functions Act 1969, s. 2(1)

Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (d)

Constitution of India [Ind], arts. 74, 75(2)

Other source(s) referred to:

Professor MP Jain, *Administrative Law of Malaysia & Singapore,* 3rd edn, p 561

O Hood Phillips, *Constitutional and Administrative Law*, 5th edn 1973, p 86

VN Shukla's Constitution of India, 7th edn (India), p 247

For the appellant - Karpal Singh (SN Nair, Ramkarpal Singh & Sangeet Kaur Deo with him); M/s Karpal Singh & Co

For the respondents - Dato' Kamaludin Md Said SFC (Azizan Md Arshad with him); AG's Chambers

A *[Appeal from Court of Appeal, Civil Appeal No: W-01-164-1998]*

[Editor's note: For the Court of Appeal judgment, please see Dato' Seri Anwar Ibrahim v. Perdana Menteri Malaysia & Anor [2007] 3 CLJ 377.]

Reported by Andrew Christopher Simon

B

JUDGMENT

Alauddin Mohd Sheriff PCA:

C

Introduction

[1] This is an appeal against the judgment of the Court of Appeal which confirmed the decision of the High Court given on 23 December 1998.

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[2] On 16 June 2008, the Federal Court granted leave to the appellant for the determination of the following questions:

(a) Whether the provision of Article 43(5) ("the said Article") of the Federal Constitution ("FC") specifically require the DYMM Yang Di-Pertuan Agong to be the authority which revokes the appointment of the Deputy Prime Minister and Minister of Finance in the Malaysian Cabinet, having regard to the principle that it is only the authority which appoints has the right to revoke any appointment made by it;

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(b) Whether the deletion of the name of the appellant from the post of Deputy Prime Minister and its substitution thereof with the name of the First Respondent as the Minister of Finance by virtue of the Ministers of the Federal Government (Amendment) Order 1998 "the said Order" could in any way cure the complete absence of the first respondent complying with the explicit provision of the said Article?

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Background Facts

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[3] The appellant was appointed as the Deputy Prime Minister and also the Minister of Finance after the General Election in 1995. On 2 September 1998, the appellant was served with a letter ("letter of revocation") from the first respondent stating that his appointment as the Deputy Prime Minister and Minister of Finance was revoked with immediate effect.

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[4] The letter of revocation reads as follows: **A**

Yang Berhormat Dato' Seri Anwar bin Ibrahim

Yang Berhormat Dato',

Dengan dukacitanya saya terpaksa melucutkan jawatan-jawatan Timbalan Perdana Menteri dan Menteri Kewangan daripada Dato' Seri serta lain-lain jawatan dalam Kerajaan yang dipegang oleh Dato' Seri sebagai Timbalan Perdana Menteri dan Menteri Kewangan. **B**

Perlucutan ini berkuatkuasa dari hari ini, 2 September 1998 mulai jam 5.30 petang. **C**

Perlucutan ini telah dimaklumkan kepada Seri Paduka Baginda Yang di Pertuan Agong.

Salam hormat. **D**

t.t.

Dr. Mahathir bin Mohamad
2 September 1998.

E

[5] Premised on the letter of revocation, the appellant contended that the first respondent had unlawfully revoked his appointment as a Cabinet Minister. According to the appellant the revocation of his appointment was in contravention of the said article. The reason is, the wordings of the letter of revocation that "Perlucutan ini telah **F** dimaklumkan kepada Seri Paduka Baginda Yang di Pertuan Agong" runs in the face of the clear wordings of the said Article which provides that the appointment of any Minister shall be revoked by the Yang di Pertuan Agong on the advice of the Prime Minister. In other words the contention of the Appellant is that the **G** revocation must be effected by the Yang di Pertuan Agong acting on the advice of the first respondent. It cannot be effected by the first respondent without having the prior assent of the Yang di Pertuan Agong.

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[6] Aggrieved with the above decision the appellant filed an originating summons (OS) at the High Court Kuala Lumpur (see pp. 20 to 25 AR) seeking the following relief:

(a) a declaration that the First Respondent had acted in contravention of the provisions of the said Article when **I** purporting to dismiss the Appellant from the Malaysian Cabinet;

A (b) a declaration that the Appellant's dismissal as a Minister in the Malaysian Cabinet by the First Respondent from 5.30 pm on 2 September 1998 is null and void, inconsequential and of no effect;

B (c) a declaration that the Appellant is still a Minister in the Malaysian Cabinet; and

(d) costs and other relief deemed fit and proper.

C **[7]** After having entered appearance, the respondents then filed an application pursuant to O. 18 r. 19(1)(a), (b) and (d) of the Rules of the High Court ("RHC") to strike out the appellant's OS and affidavit in support on the grounds that the pleadings disclose no reasonable cause of action and that they are scandalous, frivolous, vexatious and an abuse of the process of court.

D **[8]** The respondents' application was premised on the following grounds:

(a) the Yang di Pertuan Agong had given His Majesty's assent to the Appellant's dismissal;

E (b) the Yang di Pertuan Agong had made the said Order, to delete the name of the Appellant from the post of Deputy Prime Minister and had substituted in that column with the name of the First Respondent for the post of the Finance Minister; and

F (c) this is a clear and obvious case for the Court to strike out the Appellant's OS and the affidavit in support.

[9] The learned judge agreed with the respondents and dismissed the appellant's OS. The learned judge was satisfied that the letter G of revocation had satisfied the requirement of the said article.

[10] The appellant's appeal to the Court of Appeal was dismissed. Hence the present appeal.

H **Findings Of The High Court**

[11] In essence the High Court held that as the Yang di Pertuan Agong was informed of the decision of the first respondent to dismiss the appellant from his posts, the omission to state the same in the revocation letter dated 2 September 1998 was inconsequential. I The requirement under the said article of the FC had been satisfied thus the revocation of the appointment of the appellant was validly made.

[12] As there was no dispute to the facts of the case and the court had made its finding on the legal effect of the said article, the action discloses no reasonable cause of action and was obviously unsustainable.

[13] This is what the learned judge said in his judgment:

> It is true that there is nothing in PM's letter to show that the letter was written at the behest of the King. Nevertheless as the King was advised and informed about the decision (keputusan) as evidenced by para 4 and 5 of the affidavit (enclosure 10) of the private secretary, such omission, in my view, is of no consequence. A *fortiori,* the aforesaid affidavit evidences lend support to the averment in PM's letter in that he (PM) had informed the King about the revocation. Looking at undisputed facts objectively, in substance although not in form, in my judgment, the letter of revocation, has satisfied the requirement of Article 43(5).

Findings Of The Court Of Appeal

[14] The Court of Appeal in its judgment agreed with the interpretation of the said article as expressed by his lordship Justice Lamin PCA (as he then was) in the case of *Dato' Seri Anwar Ibrahim v. Public Prosecutor* [2000] 2 CLJ 695. There the learned judge was of the view that a Minister holds office at the pleasure of the Prime Minister. It is the Prime Minister who decides on the revocation of his appointment. Reference to the Yang di Pertuan Agong in the article is only a matter of formality for the Yang di Pertuan Agong had no say in such a matter but to act on it.

[15] Speaking through Raus Sharif JCA (as he then was) the Court of Appeal had this to say in its judgment (see p. 118 AR) (*Dato' Seri Anwar Ibrahim v. Perdana Menteri Malaysia & Anor* [2007] 3 CLJ 377 at p. 391 – Editor):

> Under the scheme of our Federal Constitution, the Yang di Pertuan Agong is a constitutional monarch who acts on ministerial advice and not on his own initiative. The power to dismiss any Minister is in effect with the Prime Minister. He can at any time advise the Yang di Pertuan Agong to dismiss any Minister and His Majesty is bound to act on the advice of the Prime Minister. In short, no Minister can remain as a member of the cabinet if the Prime Minister decided that he should be dismissed.

[16] The same view was expressed by Zulkefli Ahmad Makinudin JCA (as he then was) in his judgment (at pp. 125-126 AR). (*Dato' Seri Anwar Ibrahim v. Perdana Menteri Malaysia & Anor* [2007] 3 CLJ 377 at p. 385 – Editor): His Lordship opined:

> As rightly stated by my learned brother Raus Sharif, JCA in his judgment that under the scheme of our Federal Constitution the power to dismiss any Minister is in effect with the Prime Minister. He can at any time advise the Yang di Pertuan Agong to dismiss any Minister and the Yang di Pertuan Agong as a constitutional monarch is bound to act on the advice of the Prime Minister.

[17] The Court of Appeal further held that based on the uncontroverted evidence before the court, the Yang di Pertuan Agong had been informed and advised on the revocation of the appellant's appointment and that the Yang di Pertuan Agong had accepted the said advice. The revocation of the appellant's appointment was held to be rightly made.

The Appeal

[18] Before us, Encik Karpal Singh, learned counsel for the appellant submitted that the learned judges of the Court of Appeal were wrong in not holding that the requirement of the said article of the FC in relation to the dismissal of the appellant as the Deputy Prime Minister and Minister of Finance had been contravened by the first respondent.

[19] Learned counsel further submitted that the learned judges of the Court of Appeal were wrong in not holding that the first respondent had clearly abused his power by revoking the appellant's appointment as the Deputy Prime Minister and Minister of Finance and then informing the Yang di Pertuan Agong when it was the Yang di Pertuan Agong alone who had the prerogative to revoke the appellant's appointment pursuant to the said article.

[20] Since it was the Yang di Pertuan Agong who in the first place appointed the appellant to the said positions pursuant to art. 43(1)(b) of the FC on the advice of the first respondent it must follow that only the Yang di Pertuan Agong, being the appointing authority, could revoke that appointment. Section 29 of the Interpretation and General Clauses Ordinance 1948 was quoted in support of this submission.

[21] It was also submitted by Encik Karpal that the learned judges of the Court of Appeal were wrong in not holding that the deletion of the name of the appellant from the post of Deputy Prime Minister and Minister of Finance and substitution thereof with the name of the first respondent as the Minister of Finance by virtue of the said order, could not in any way cure the complete absence of the first respondent complying with the explicit provisions of the said article.

[22] It was further submitted that it is a prerequisite that compliance with the provisions of the said article is met before deletion and substitution can be effected by virtue of the said order. According to Encik Karpal, the appellant's case was not one which was plain and obviously unsustainable meriting recourse to the summary process of striking out. He submitted that the letter of revocation by itself had raised a serious question to be tried ie, whether prior assent of the Yang di Pertuan Agong had been obtained when the letter of revocation was sent to the appellant.

[23] At the close of his submission Encik Karpal quoted the cases of *Re Tan Boon Liat @ Allen & Anor Et Al; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri & Ors And Chuah Han Mow v. Menteri Hal Ehwal Dalam Negeri & Ors And Subramaniam v. Menteri Hal Ehwal Dalam Negeri & Ors* [1977] 1 LNS 110, *Lee Kwan Woh v. PP* [2009] 5 CLJ 631 and *Shamim Reza Abdul Samad v. PP* [2009] 6 CLJ 93 in support. However we found the above cases to be irrelevant to the issue raised before us.

[24] The learned Senior Federal Counsel in the person of Dato' Kamaludin bin Md. Said submitted otherwise. For the reasons he had advanced he submitted that the High Court and the Court of Appeal were right in their decisions that the appellant's case was obviously unsustainable.

[25] The principle governing O. 18 r. 19 of the RHC is well settled. The Federal Court in *Sim Kie Chon v. Superintendant of Pudu Prison & Ors* [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 at p. 294 held:

> The principle governing the striking out of pleadings is clear in that it is only in plain and obvious cases that recourse should be had to the summary process under O. 18 r. 19 of the Rules of the High Court 1980: "the Summary procedure under this rule can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'."

[26] Again, the Federal Court in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 at p. 11, echoed the same sentiment in the following words:

> The principles upon which the courts act in exercising its power under any of the four limbs of O. 18 r. 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'.

[27] The Federal Court further stated:

> The Court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[28] Thus the main issue for consideration before us is whether the appellant's claim is obviously unsustainable.

[29] In order to do so, it is necessary that we examine the questions posed and the relevant provisions in the FC in relation to the appointment and revocation of Cabinet Ministers.

Our Findings

[30] To reiterate, Question 1 reads as follows:

> Whether the provision of the said Article of the FC specifically require the DYMM Yang di Pertuan Agong, to be the authority which revokes the appointment of Deputy Prime Minister and Minister of Finance in the Malaysian Cabinet, having regard to the principle that it is only the authority which appoints has the right to revoke any appointment made by it.

[31] We shall start by saying that under the FC the Yang di Pertuan Agong is a constitutional monarch. His functions and powers are as entrenched in the following articles:

> **Article 39 – Executive Authority of the Federation**
>
> The executive authority of the Federation shall be vested in the Yang di Pertuan Agong and exercisable, subject to the provisions of any federal law and of the Second Schedule, by him or by the Cabinet or any Minister authorised by the Cabinet, but Parliament may by law confer executive function on other persons.

Article 40 – Yang di Pertuan Agong to act on advice

(1) In the exercise of his functions under this Constitution or federal law the Yang di Pertuan Agong shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, except as otherwise provided by this Constitution; but shall be entitled, at his request, to any information concerning the government of the Federation which is available to the Cabinet.

(1A) In the exercise of his functions under this Constitution or federal law, where the Yang di Pertuan Agong is to act in accordance with advice, on advice, or after considering advice, the Yang di Pertuan Agong shall accept and act in accordance with such advice.

(2) The Yang di Pertuan Agong may act in his discretion in the performance of the following functions, that is to say:

(a) the appointment of a Prime Minister;

(b) …;

(c) …;

and in any other case mentioned in this Constitution.

Article 43(5) (the said Article)

Subject to Clause (4), Ministers other than the Prime Minister shall hold office during the pleasure of the Yang di Pertuan Agong, unless the appointment of any Minister shall have been revoked by the Yang di Pertuan Agong on the advice of the Prime Minister but any Minister may resign his office.

[32] It must be properly observed that art. 40 divides the functions of the Yang di Pertuan Agong into two distinct categories ie, those functions that he may exercise in his discretion and those that he must exercise or act in accordance with ministerial advice.

[33] Except for his function under art. 40(2) which provides that the Yang di Pertuan Agong may act in his discretion, the other functions to be exercised by him under the Constitution or federal law shall be exercised in accordance with the advice of the Cabinet or Minister acting under the general authority of the Cabinet.

[34] In *Merdeka University Bhd. v. Government of Malaysia* [1981] CLJ 175; [1981] CLJ (Rep) 191 (at p. 195) Abdoolcader J (as he then was) had this to say:

> It would perhaps be appropriate to clarify two matters at this exordial stage. First, the Yang di Pertuan Agong is a constitutional monarch and is required under Article 40(1) of the Federal Constitution in the exercise of his function (except on certain matters that do not concern these proceedings) to act in accordance with collective or individual ministerial advice and not on his own initiative (*Balakrishnan v. Ketua Pengarah Perkhidmatan Awam Malaysia and Government of Malaysia* [1981] 2 MLJ 259.

[35] The same case went on appeal to the Federal Court [1982] 1 LNS 1; [1982] 2 MLJ 243. At p. 246, speaking through Suffian LP (as he then was) the Federal Court said:

> Though the plaintiff's application was rejected by His Majesty, in fact the decision was that of the Government, because His Majesty is a constitutional monarch and in this regard he was required by Article 40(1) of the Constitution to:
>
> > 'act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet …' (see also *Loh Wai Kong v. Government of Malaysia* [1978] 2 MLJ 175; *Teh Cheng Poh v. PP* [1979] 1 MLJ 50 and *Dato' Seri Anwar Ibrahim v PP* [2000] 2 MLJ 486).

[36] On the same issue learned scholars and authors on Constitutional Law share the same view. Professor MP Jain in his book *"Administrative Law of Malaysia & Singapore"* 3rd edn at p. 561 said:

> In *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia*,[103] the Federal Court ruled that the Yang di Pertuan Agong in exercising power to make a detention order under section 8(1) of the Internal Security Act 1960, would act on the advice of the Cabinet and not on his own personal satisfaction.[104] As the Privy Council emphasised,[105] the functions of the Yang di Pertuan Agong are those of a constitutional monarch and except on certain matters he does not exercise any of his functions under the Constitution on his own initiative.

[37] On the appointment of members of the Cabinet Henry E. Groves in his book *"The Constitution of Malaysia, 1964"* observed:

> The Prime Minister selects all members of the Cabinet from among the members of either House of Parliament. Their appointment is effected by the Yang di Pertuan Agong acting without discretion on the advice of the Prime Minister.

[38] In order to understand the issue in its proper perspective we feel it is appropriate that we refer to the provisions of the Constitution of some other jurisdictions.

[39] In particular we would like to refer to art. 74 of the Indian Constitution which is in *pari materia* with art. 40(1) of our Constitution. It reads:

> Council of Ministers to aid and advise President – ((1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.)

[40] Article 75(2) of the Indian Constitution is in *pari materia* with our art. 43(5) (the said article). *V.N. Shukla's Constitution of India,* 7th edn (India) (at p 247) commented that:

> Clause 2 lays down that the Ministers hold office during the pleasure of the President. The fact that each member holds office at the pleasure of the President indicates that his office is at all times at the Prime Minister's disposal, for in these matters the President, like the King in England, acts on the advice of the Prime Minister. Moreover for the effective realization of the rule of collective responsibility of the Council of Ministers, it is necessary that no person should be nominated to the Cabinet except on advice of the Prime Minister. Secondly, no person should be retained, as a member of the Cabinet if the Prime Minister says that he should be dismissed.

[41] Referring to the UK position, O. Hood Phillips in his book *"Constitutional and Administrative Law"* 5th edn 1973 (at p. 86) remarked as follows:

> The Queen is bound to exercise her legal powers in accordance with the advice tendered to her by the Cabinet through the Prime Minister. She has the right to be kept informed and to express her views on the questions at issue, but not to override ministerial advice.

[42] Further at p. 273, the writer opined:

> It should be borne in mind that the Prime Minister may always advise the Sovereign to dismiss a Minister – all ministerial posts are regarded as being at his disposal.

[43] In view of the foregoing provisions it is our judgment that the Yang di Pertuan Agong as a constitutional monarch has a very limited role concerning the appointment of Cabinet Ministers. In actual fact the power to choose and appoint Ministers resides with the Prime Minister. The Prime Minister is responsible in choosing his Cabinet members. The Yang di Pertuan Agong upon being advised by the Prime Minister on the choice of his candidates must act on such advice. His Majesty does not have any discretion to reject or question the discretion of the Prime Minister. Revocation of the appointment equally lies with the Prime Minister having regard to the principle that it is only the authority which appoints that has the right to revoke the appointment. If the Prime Minister has decided that a particular Minister should cease from holding the office of a Minister then the Yang di Pertuan Agong would not be able to say otherwise. Reference to the Yang di Pertuan Agong in the said Article of the FC is only a formality by virtue of His Majesty being the constitutional monarch. Such a clear demarcation of power and roles between the Prime Minister and the Yang di Pertuan Agong in matters of appointment and revocation of ministerial posts is imperative in order to realize the role of collective responsibility of the Cabinet Ministers.

[44] Reflecting on the undisputed facts in the appeal before us we agree with the learned High Court Judge and the judges of the Court of Appeal that the requirement under the said article of the FC had been met.

[45] We have no doubt that the first respondent here had conveyed his decision to revoke the appointment of the appellant as the Deputy Prime Minister and the Minister of Finance to the Yang di Pertuan Agong and His Majesty had no objection. (Please refer to the Hansard dated 23 October 1998 at pp. 85-88 AR).

[46] Following that the Yang di Pertuan Agong had accepted the decision and advice of the first respondent regarding the revocation of the appellant's appointment. (Please refer to para 4 & 5 of Haji Ja'apar's affidavit at p. 71 AR).

[47] In his affidavit affirmed on 13 November 1998 (see pp. 58 to 61 AR) at para 5 the appellant also deposed that the revocation of his appointment had been communicated to the Yang di Pertuan Agong (see also exh.s DSA1 & DSA2 at p. 80-82 AR). A

[48] In assessing these facts the Court of Appeal (speaking through Raus JCA (as he then was) held as follows (see p. 120 AR): B

> My respectful view is that the revocation letter by itself to a certain extent had created an impression that the formality of advising the Yang di Pertuan Agong was not done by the 1st respondent. However looking at the affidavits filed in support of the respondents' application, there is more than sufficient evidence to show that the formality was done. We have the affidavit evidence of Hj. Ja'apar who had affirmed that the Yang di Pertuan Agong had accepted the decision and the advice of the 1st respondent pertaining to the revocation of the appellant. The appellant did not contradict the said evidence. It is well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted." (See *Ng Hee Thong v. Public Bank Bhd* [1995] 1 MLJ 287; *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1980] 1 MLJ 382; *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332). C D E

[49] Speaking for the Court of Appeal, Zulkefli Ahmad Makinudin, JCA (as he then was) had this to say in respect of the revocation letter: F

> It has also to be stated here that the format and the manner on how a revocation of the appointment of a Cabinet Minister is to be effected is not provided in the law. There is also no provision in the law that the revocation of the appointment of the appellant as a Cabinet Minister shall be communicated to the appellant personally by the Yang di Pertuan Agong. The letter for the revocation of the appointment of the appellant which was handed to the appellant stated that the Yang di Pertuan Agong had been informed. It is my view by this statement from the first respondent it would be a fair inference to make a finding that in fact on or before 2 September 1998 the decision and the advice of the first respondent had already been conveyed to the Yang di Pertuan Agong and that the Yang di Pertuan Agong had accepted the said decision and advice. The case for the respondents is further fortified by the affidavit evidence of G H I

A Hj. Ja'apar bin Wahab who was the Confidential Secretary to the Yang di Pertuan Agong, affirming that the Yang di Pertuan Agong had informed him of the decision and the advice of the first respondent to revoke the appellant's appointment as a Minister and His Majesty had duly accepted the said decision and advice of the first respondent.

B

[50] With respect, we agree fully with the findings of the Court of Appeal as mentioned above.

[51] We also agree, based on facts that the revocation of the C appellant's appointment was made in accordance with the said article of the FC and therefore valid in law.

[52] We find that the appellant's contention that it was the first respondent who had effected the revocation and not the Yang di Pertuan Agong is fallacious and untenable.

D

[53] Premised on the above, we must with utmost respect to the appellant say that the only answer that we can give to the first question is in the negative.

E **[54]** We shall now consider the second question which reads:

Whether the deletion of the name of the applicant from the post of Deputy Prime Minister and its substitution thereof with the name of the first respondent as the Minister of Finance by virtue of the said Order could in any way cure the complete absence of the First F Respondent complying with the explicit provision of the said Article?

[55] Obviously the second question is predicated upon a positive answer to Question 1. The factual matrix to this question can be gleaned from the affidavits deposed by Hj. Ja'apar (pp. 70-73 AR) G and Tan Sri Halim Ali (p. 66 to 69 AR). The said order was sent to the Yang di Pertuan Agong and His Majesty gave assent to it. The said order was duly gazetted as P.U.(A)332 (see exh. "AHA1" at pp. 90-93 AR). In the said order the name of the appellant was deleted from the columns of "Persons" in the Prime Minister's H Department and the post of the Minister of Finance was substituted with the name of the first respondent.

[56] As we have stated earlier, the format and manner on how a revocation is to be effected is not provided in the law. Neither is I there any provision in the law which provides for the revocation to be gazetted. There is also no provision in the law which requires the revocation of the appointment of the appellant to be conveyed to the appellant personally by the Yang di Pertuan Agong.

[57] The said order as a gazette is a form of subsidiary legislation (see s. 18(1)(b) of the Interpretation Acts 1948 and 1967 (Act 388) and it shall be deemed to be validly made under the enabling power thereto (s. 25 Act 388). A gazette is a *prima facie* evidence of the terms of written law, appointment or any other matter stated therein (s. 61 Act 388).

[58] The said order was made by the Yang di Pertuan Agong by virtue of s. 2 of the Ministerial Functions Act 1969 (Act 2). Section 2 of Act 2 provides for "Functions, styles and titles of Ministers".

[59] Section 2(1) gives powers to the Yang di Pertuan Agong to notify any changes with regard to the functions and responsibility in the Cabinet by an order in the Gazette and subsection 2 allows His Majesty to make any consequential provisions deemed necessary for the purpose of giving effect to the said order.

[60] Taking into consideration that the said order, being a Gazette, is a *prima facie* evidence of the terms contained therein, it is clearly stated that in exercising his powers under s. 2 of Act 2, The Yang di Pertuan Agong notified the revocation of the appellant's appointment and the said Order was made under His Majesty's command. Such a command from His Majesty, in the absence of any contrary evidence, implies that it was made with explicit assent. This was further supported by the undisputed affidavit evidence of Hj. Ja'apar and Tan Sri Halim Ali (see pp. 66 to 73 AR) which explained that the Yang di Pertuan Agong had given his assent to the said order.

[61] The said order would have been impossible without His Majesty's assent. His Majesty had given his assent to the terms in the said order which in effect revoked the appellant's appointment. Once assent is given, it shows that His Majesty had accepted the advice of the Prime Minister and acted on such advice.

[62] The gazette is therefore sufficient evidence to show that the requirement of the said article of the FC had been met. The appointment of the appellant as the Deputy Prime Minister and the Minister of Finance had therefore been validly revoked by the said order.

[63] In view of the foregoing, we would say that the omission of the first respondent (if any) to follow the requirement under the said article of the FC is curable by the said order. It follows therefore that the answer to Question 2 must be in the positive.

Conclusion

[64] From our reading of arts. 39, 40(1), 40(1A), 40(2) and 43(5) of the FC and arts. 74 and 75(2) of the Indian Constitution, the interpretation of the relevant provisions of the FC by the Constitutional Law book writers and the cases we have cited, we must say with utmost respect that the High Court and the Court of Appeal were correct in their decisions that as a constitutional monarch the Yang di Pertuan Agong is required to act in accordance with the advice of the Cabinet or of a Minister acting under the General Authority of the Cabinet. The convention that the Head of State must act on advice of the Government on matters which are not within the purview of his discretion has been followed in Malaysia in the same manner as it is being practised in Britain.

[65] Finally we find ourselves in agreement with the learned High Court Judge and the judges of the Court of Appeal that the appellant's case (OS) discloses no reasonable cause of action and is obviously unsustainable.

[66] In the result the appeal is dismissed with costs. Deposit to respondent to account of costs.